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THE NATURE AND SCOPE OF THE RIGHT OF APPEAL ON QUESTIONS OF THE FUNDAMENTAL RIGHT TO FAIR HEARING FROM DECISIONS OF THE NATIONAL INDUSTRIAL COURT OF NIGERIA[1]

Introduction

Since the enactment of the Third Alteration Act of the Constitution of the Federal Republic of Nigeria, 1999 ("the Constitution"), which elevated the National Industrial Court of Nigeria (NICN) to a superior court of record, there have been a lot of controversies as to the nature and scope of the constitutional right of appeal from decisions of the NICN. First was the issue of whether there is any right of appeal in civil matters from the decisions of the NICN other than those on questions of fundamental rights as contained in the Constitution. That question was answered with finality by the Supreme Court of Nigeria in the case of **Skye Bank v. Iwu**[2] where the apex court held that appeals in civil matters lie as of right from the decisions of the NICN on questions of fundamental rights as contained in the Constitution and with leave on all other questions.

However, there is a lingering controversy regarding the exact nature and scope of the right of appeals on questions of breach of the fundamental right to fair hearing as contained in chapter 4 of the Constitution. One school of thought says that once the pleadings of the parties raise questions of breach of the right to fair hearing, appeals from the decision of the NICN on such issues lie as of right. Another school of thought says that it is only where an alleged breach is levelled against a Court that appeals would lie as of right to the Court of Appeal.

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2 Skye Bank v. Iwu (2017) LPELR-42595(SC) (pp 198 - 205 paras F - E).

This article seeks to examine this lingering controversy and determine through decided authorities and the relevant provisions of the Constitution what is the correct position of the law.

Nature of the Right of Appeal from Decisions of the NICN

Section 243(2) and (3) of the of the Constitution provides as follows:

> *(2) An appeal shall lie from the decision of the National Industrial Court as of right to the Court of Appeal on questions of fundamental rights as contained in Chapter IV of this Constitution as it relates to matters upon which the National Industrial Court has jurisdiction.*
> *(3) An Appeal shall only lie from the decision of the National Industrial Court to the Court of Appeal as may be prescribed by an Act of the National Assembly: Provided that where an Act or Law prescribes that an appeal shall lie from the decisions of the National Industrial Court to the Court of Appeal, such appeal shall be with the leave of the Court of Appeal.*

By the above provisions of the Constitution, it is only where the grounds of appeal contained in a party's notice of appeal raise questions of fundamental rights as contained in the Constitution that such a party can appeal as of right to the Court of Appeal. In every other case, such a party must seek the leave of the Court of Appeal before filing a valid appeal from the decision of the NICN.[3] The implication of this is that if a party fails to seek leave to appeal when leave is required, any such appeal filed without leave would be incompetent and liable to be struck out by the Court of Appeal.[4]

The fundamental rights are contained in Chapter 4 of the Constitution which spans from section 33 to section 46 of the Constitution. They encompass the right to life, right to dignity of human person, right to personal liberty, right to fair hearing, right to private and family life, right to freedom of thought, conscience and religion, right to freedom of expression, right to freedom of movement, right to freedom from discrimination and right to acquire and own immoveable property anywhere in Nigeria. Where a ground of appeal from a decision of the NICN raises questions on any of these rights, such an appeal would lie as of right, otherwise the aggrieved party would have to first seek and obtain the leave of the Court of Appeal before filing a competent appeal.

Any question about the incidents of any of these rights appears to be very simple and straightforward except for questions on the fundamental right to fair hearing as contained in section 36 of the Constitution. Section 36(1) of the Constitution provides as follows:

> *In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal*

[3] *Ibid.*
[4] See, *KWASU & Ors v. Alao* (2020) LPELR-52508(CA) (pp 8 - 28 paras E - D).

established by law and constituted in such a manner as to secure its independence and impartiality.

Two schools of thought have emerged in the interpretation of the above provision of the Constitution from available decided cases. The first school of thought contends that once the pleadings of the parties raise questions of breach of a party's fundamental right to fair hearing, appeals from the decision of the NICN on such issues lie as of right to the Court of Appeal. The second school of thought posits that it is only where a party's fundamental right to fair hearing is infringed by the trial court in the determination of the party's case that appeals would lie as of right to the Court of Appeal. In other words, even if the issues in contention between the parties and decided by the trial court raised questions of breach of a party's right to fair hearing by an administrative or other tribunal not established by law, appeals would not lie as of right unless the trial Court committed a breach of the party's fundamental right to fair hearing in its proceedings.

There are a lot of decided authorities which have affirmed the first school of thought. For this article, we shall only consider two of them below.

Elam v. Adamawa State Judicial Service Commission & Ors.[5]

The Appellant commenced this case at the NICN by an originating summons against the Respondents to challenge her compulsory retirement by the 1st Respondent. In the originating summons she raised 8 questions for determination by the court. The questions bordered on the violation of her right to fair hearing. The trial court dismissed her case on technical grounds and she appealed without seeking leave to the Court of Appeal.

In response to the appeal, the Respondents filed a notice of preliminary objection where they challenged the competence of the appeal on the ground that the Appellant failed to seek the leave of the Court of Appeal before filing the appeal. They accordingly urged the court to strike out the appeal for lack of competence.

In resolving the notice of preliminary objection, the Court of Appeal interpreted section 243(2) and (3) of the Constitution and held as follows:

> *The above provision is to the effect that where an appeal from the National Industrial Court of Nigeria is premised on questions of fundamental rights as contained in Chapter IV of the Constitution in respect of matters in which the National Industrial Court has jurisdiction, appeal to this Court would be as of right. The Appellant in her originating summons before the trial Court raised eight (8) questions for determination by the Court. The questions raised are interwoven as rightly argued by the learned counsel to the Appellant bordering on complaints of the breach of her fundamental rights especially her right to fair*

[5] See, *Elam v. Adamawa State Judicial Service Commission & Ors* (2021) LPELR-55980(CA) (pp 18 - 20 paras D - A). See also, *UCH Board of Mgmt v. Morakinyo* (2014) LPELR-23416(CA).

> *hearing as guaranteed by Section 36(1) of the Constitution. It is noteworthy that the reliefs sought by the Appellant on the determination of the questions sought at the trial Court are tied to the breach of the Appellant's fundamental rights as claimed to have been breached. The provision of Section 243(2) of the Constitution is clear, it is to the effect that once the nature of the case before the trial Court borders on the fundamental rights of the claimant, an Appellant would not need to seek the leave of this Court to appeal....*

A similar decision was also reached in the case of **Akpan v. UNICAL**[6] where the Court of Appeal dismissed the Respondent's notice of preliminary objection which challenged the competence of the Appellant's grounds of appeal on the basis that the Appellant did not first seek and obtain the leave of the Court of Appeal before appealing on those grounds. The Court of Appeal held that since the issues in contention between the parties at the trial Court bordered on the alleged breach of the fundamental right to fair hearing of the Appellant by the Respondent in his summary dismissal by the Respondent, the Appellant was entitled to file his appeal as of right. The Court of Appeal accordingly dismissed the Respondent's notice of preliminary objection as "*superfluous and a needless exercise*."

A common thread running through the above two decisions is that once the issues in contention between the parties at the trial Court is the breach of any of the parties' right to fair hearing, an appeal against the decision of the NICN on such issues lies as of right to the Court of Appeal whether or not the alleged breach was charged against the trial Court.

For the second school of thought, the case of **KWASU & Ors v. Alao**[7] properly captures its arguments. In this case, the Appellants appealed to the Court of Appeal against the decision of the NICN on 10 grounds of appeal. The Respondent raised an objection to the competence of the appeal on the premise that the Appellants' grounds of appeal did not raise questions of fundamental right and they did not seek the leave of the Court of Appeal to appeal on those grounds. The Respondent's argument interestingly was that since the reliefs and issues contested at the trial court by the parties did not border on breach of fundamental rights as contained in the Constitution, the Appellants were not entitled to appeal to the Court of Appeal as of right.

The Court of Appeal disagreed in principle with the Respondent but nevertheless concluded that the appeal was indeed incompetent. The Court of Appeal categorically stated that it is not correct to contend that the question of fundamental human right to fair hearing envisaged by section 243(2) and (3) of the Constitution refers to the claimant's reliefs and claims at the NICN, or that it is only an appeal on or touching or relating to fundamental rights contained in such reliefs or claims that confers an automatic right of appeal to the Court of Appeal, from a

[6] *Akpan v. UNICAL* (2016) LPELR-41242(CA) (pp 11 - 13 paras F - D).
[7] *KWASU & Ors v. Alao* (2020) LPELR-52508(CA) (pp 8 - 28 paras E - D).

decision of the NICN. The Court of Appeal in espousing the law on the nature of the right of appeal on questions of breach of the fundamental right to fair hearing as contained in section 36(1) of the Constitution held that the provisions of section 36(1) of the Constitution are applicable only where the determination of the civil rights and obligations of a person are involved in a dispute being litigated before a Court of law or a tribunal established by law. According to the Court, fair hearing which is entrenched in the Constitution is based on determining or testing the constitutionality of a trial in terms of procedure. In other words, the principles do not apply where the alleged breach of the right to fair hearing was committed by an administrative tribunal not established by law or by an employer in the discipline and punishment of an employee. According to the Court, the test for fair hearing under section 36(1) of the Constitution is whether the appellant's grounds of appeal complain of denial of access to the Court or not being treated fairly by the Court or being prevented from presenting his case freely without any hindrance by the Court. Accordingly, if the complaint in the appellant's grounds of appeal is about breach of his right to fair hearing by a domestic tribunal, his appeal would not lie as of right.

What is the correct position of the law?

A careful review of section 36(1) of the Constitution and decided authorities shows that the second school of thought aligns more with the provisions of section 36(1) of the Constitution. This is because section 36(1) of the Constitution imposes the duty to accord a person fair hearing only on "...*a court or other tribunal established by law…."* If this is read together with the wording of section 243(2) of the Constitution which specifically states that an appeal shall lie from the decision of the NICN as of right to the Court of Appeal *"on questions of fundamental rights as contained in Chapter IV of this Constitution"*, it would be seen that the only fundamental right to fair hearing cognizable under section 243(2) of the Constitution is such as is contained in chapter 4 of the Constitution; and section 36(1) has limited the duty to accord a person fair hearing to only courts and other tribunals established law. The consequence of this is that whilst every body or person acting judicially or quasi-judicially has a duty to accord a person fair hearing in line with the common law principle of natural justice, it is only courts or tribunals established by law that can be charged with a breach of the constitutional right to fair hearing since they are the only bodies with a constitutional duty to accord a person fair hearing. This was categorically dealt with by the Supreme Court in the case of **Rev. Prof Paul Emeka v. Rev Dr. Chidi Okoroafor & Ors.,**[8] where the Supreme Court held as follows:

> *All administrative bodies, even though they are not Courts, are bound to observe the rules of natural justice and fairness in their decisions, which affect the rights and obligations of citizens. See: Bakare Vs L.S.C.S.C. (1992) 8 NWLR*

[8] *Rev. Prof Paul Emeka v. Rev Dr. Chmi Okoroafor & Ors* (2017] 14 NWLR (Pt. 1577) 410.

> *(Pt.262) 641 @ 699 H. However, in order to seek to enforce his fundamental right to fair hearing provided for under Chapter IV of the Constitution, the alleged violation must be in respect of proceedings before a Court or Tribunal established by law and not before domestic or standing ad-hoc Tribunals. See: Ekunola Vs C.B.N. {2013) 15 NWLR (1377} 224 @ 262 - 263 H - A. In Bakare Vs L.S.C.S.C. (supra) @ 700 A - B, this Court, per Nnaemeka Agu, JSC had this to say: "The Courts in exercise of their power of judicial review are constantly called upon to scrutinize the validity of instruments, laws, acts, decisions and transactions. In the exercise of the jurisdiction, the Courts can declare them invalid or ultra vires and void, not because they are unconstitutional in terms of Section 33 of the Constitution [now Section 36 of the 1999 Constitution], but because they offend against the rules of natural Justice of audi alteram partem or nemo judex in causa sua, or offends against the rules of fairness, or otherwise offends the rule of natural justice. All these are in the realm of administrative and not constitutional law. The great divide is that Section 33 deals with judicial bodies and does not necessarily extend to all bodies not judicial but all the same deciding on rights and obligations.*[9]

The implication of this is that a breach of a fundamental right under section 36(1) of the Constitution arises only where the denial of fair hearing has been charged against a court or tribunal established by law and not before a domestic or ad-hoc tribunal raised departmentally by parties. In other words, there would be no case of infringement of the right to fair hearing under section 36(1) of the Constitution when the decision alleged to have violated one's constitutional right to fair hearing, is not that of a court or tribunal established by law. Accordingly, any ground of appeal which complains about a violation of the right to fair hearing by a domestic tribunal or the finding of the NICN one way or the other on any such complaint cannot lie as of right because the alleged violation is not charged against a court or other tribunal established by law.

Conclusion

Based on the foregoing analysis of the provisions of section 36(1) and section 243(2) and (3) of the Constitution together with relevant decided authorities, an appeal from the decision of the NICN would lie as of right on the ground of breach of the right to fair hearing only if the alleged breach of the right to fair hearing is charged against a court or other tribunal established by law. Where the alleged breach of the right to fair hearing was committed by an administrative tribunal not established by law or by an employer in the discipline and punishment of an employee and the appeal is against the decision of the NICN one way or the other on such alleged breach, the aggrieved party would have to seek the leave of the Court of Appeal in order to be able to competently appeal on such grounds. The test as earlier stated for fair hearing under section 36(1) Constitution is whether the appellant's grounds of

[9] See, *Bakare v. LSCSC* (1992] 8 NWLR (Pt. 266) 641 at 699 - 700 and *Ekunola v. CBN* (2013] 15 NWLR [Pt. 1377] 224 at 262 -263.

appeal complain of denial of access to the Court or for not being treated fairly by the Court or being prevented from presenting a case freely without any hindrance by the Court.

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